Supreme Court, U.S.
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No. 96-1487

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

HOSEP KRIKOR BAJAKAJIAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Pursuant to SUP. CT. R. 37.6, Clarendon Foundation states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Clarendon Foundation, its members, and counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondent. Written consent to the filing of this brief has been granted by counsel for all parties, and letters of consent have been lodged with the Clerk. Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the Constitution and democratic government. The Foundation is committed to an ongoing review of the tenets of our constitutional government, in the spirit of George Mason's admonition that "no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamenta! principles." GEORGE MASON, THE VIRGINIA DECLARATION OF RIGHTS, *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 278 (R. Rutland ed. 1970). Because this case raises issues relating to the limits placed by the Eighth Amendment Excessive Fines Clause on the authority of the United States Government, we believe that our perspective will complement the briefs of the parties and assist the Court in resolving the Question Presented.

SUMMARY OF ARGUMENT

This case tests the limits that the Excessive Fines Clause of the Eighth Amendment places on the authority of the United States Government to impose the forfeiture of a person's money, when that person neglects—*even unwittingly*—to report any amount over $10,000 before carrying the money out of the country. The Government contends that the *entire* amount of any unreported funds must be forfeited and that federal courts possess the authority only to determine whether a forfeiture under 18 U.S.C. § 982(a)(1) is "'grossly disproportionate' *to the seriousness of the offense,*" Br. Pet. at 29 (emphasis

added) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983) —*rather than* relative to the culpability of the defendant.

The Government's interpretation of 18 U.S.C. § 982(a)(1) should be rejected because it violates the Constitution in at least two ways. First, it invites the imposition of unconstitutionally excessive fines by permitting the forfeiture of lawfully obtained money from even minimally culpable defendants. Second, it effectively removes an indispensable check on the Government's abuse of criminal forfeiture by all but eliminating judicial review of punishments under this statute. The significance of this latter point is all the more magnified if, as the Government urges, the statute imposes strict liability such that a defendant's culpability should never be a factor in the statute's application. Under that view, an unwitting defendant is deprived of any argument that he was ignorant of the law, as well as the possibility of equitable proportioning of punishment by a federal judge who recognizes the absence of *mens rea* but is powerless to do anything about it, notwithstanding apparent violation of the Excessive Fines Clause.

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 982(a)(1) INVITES THE IMPOSITION OF UNCONSTITUTIONALLY EXCESSIVE FINES BY THREATENING FORFEITURE OF LAWFULLY OBTAINED MONEY FROM MINIMALLY CULPABLE DEFENDANTS.

The forfeiture statute codified at 18 U.S.C. § 982(a)(1) applies, among other times, when a person is convicted of failing to report any amount of currency in excess of $10,000 before taking the money out of the country.

> The court, in imposing sentence on a person convicted of an offense in violation of section . . .

> 5316 . . . of title 31 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

The Government argues that criminal forfeiture under Section 982(a)(1), predicated solely on the failure to file a currency report, satisfies the Excessive Fines Clause without case-specific judicial "inquiry into the culpability of the owner or the property's economic value." Br. Pet. at 11. Contrary to the Ninth Circuit's holding below, *see United States v. Bajakajian*, 84 F.3d 334, 337-38 (9th Cir. 1996), the Government would have this Court construe any amount of unreported funds, regardless of the culpability of the defendant or the source of the funds, as the instrumentality of crime. *See* Br. Pet. at 10, 19-20. According to the Government, the instrumentality of crime, *by definition*, can be forfeited without violating the Eighth Amendment.

> [T]he forfeiture of the instrumentalities of crime, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value.

Br. Pet. at 11; *see also* Br. Pet. at 28-29.

This interpretation of Section 982(a)(1) invites violations of the Excessive Fines Clause by permitting the imposition of unconstitutionally excessive fines even where defendants act without a criminal *mens rea*. That outcome is deeply troubling because the Government carves no room for equitable adjustments to the penalty of wholesale forfeiture. To demonstrate why the Government's position is constitutionally untenable, we

first establish the premise that forfeitures under Section 982(a)(1) are limited by the Excessive Fines Clause.

A. Criminal Forfeitures Imposed Under 18 U.S.C. § 982(a)(1) Are Limited by the Excessive Fines Clause.

The Eighth Amendment prohibits the Government from imposing "excessive fines." U.S. CONST. amend. VIII. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law," *United States v. Halper*, 490 U.S. 435, 447-48 (1989). Whether the Excessive Fines Clause applies to 18 U.S.C. § 982(a)(1) therefore depends not on whether it is "civil or criminal, but rather whether it is punishment." *Austin v. United States*, 509 U.S. 602 (1993). The Court's canvass of the Eighth Amendment's doctrinal underpinning in *Austin* demonstrated that "forfeiture . . . historically [has] been understood, at least in part, as punishment." *Id.* To determine whether 18 U.S.C. § 982(a)(1) imposes punishment within the meaning of the Excessive Fines Clause, one need only look to the words of the statute itself.

Section 982(a)(1) directs the court to forfeit property "in imposing sentence on a person convicted of an offense." The forfeiture order is expressly limited to "property . . . involved in such offense, or any property traceable to such property." This statutory language not only ties forfeiture to various currency offenses, including the failure to report, *cf. Austin*, 509 U.S. 602, but limits

the property subject to forfeiture to property directly "involved" in the criminal offense or "traceable" to such property. This textual evidence of Section 982's punitive dimension cannot be ignored, as even the Government seems to recognize when it characterizes the statute as serving "punitive purposes." Br. Pet. at 11. As this Court said in an earlier case, "The in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander v. United States*, 509 U.S. 544 (1993) (citing *Austin v. United States*, 509 U.S. 602 (1993)).

Inasmuch as criminal forfeitures imposed under Section 982(a)(1) plainly implicate the limitations of the Excessive Fines Clause, the Government's interpretation of the statute is erroneous because it eviscerates—*a priori*—the prospect of a federal judge's making a case-specific adjustment to the quantity of punishment.

B. Because the Government's Interpretation of 18 U.S.C. § 982(a)(1) Would Permit the Forfeiture of Lawfully Obtained Funds from Defendants Lacking Mens Rea, the Risk of Constitutional Violation Is Heightened.

The Government argues that "the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value." Br. Pet. at 11. It rationalizes this position on the ground that "such a forfeiture is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed." *Id.* at 12. Leaving aside the question whether "unreported" necessarily means "concealed,"

there is a serious constitutional problem with the Government's interpretation of the statute.

The problem arises, in part, from a lacuna in the statute that requires the currency report. 31 U.S.C. § 5316(a)(1)(A) does not clearly say whether a person must have knowledge of the law to be guilty of violating the statute. A majority of circuits addressing the question have held that knowledge of the reporting requirement is *not* an element of the offense. *See United States v. $359,500 in United States Currency*, 828 F.2d 930, 934 (2d Cir. 1987); *United States v. $94,000.00 in United States Currency*, 2 F.3d 778, 785 (7th Cir. 1993); *United States v. Twenty Thousand Seven Hundred Fifty-Seven Dollars and Eighty-Three Cents ($20,757.83) Canadian Currency*, 769 F.2d 479, 482 (8th Cir. 1985); *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986). *But see United States v. One (1) Lot of Twenty-Four Thousand Nine Hundred Dollars ($24,900.00) in United States Currency*, 770 F.2d 1530, 1534 (11th Cir. 1985). This trend among the circuits carries grave implications for the constitutionality of the Government's interpretation of Section 982(a)(1).

The Government urges the Court to adopt the rule that any money not reported must be forfeited. When combined with the prevailing view in the circuits, which makes violation of 31 U.S.C. § 5316(a)(1)(A) a strict liability offense, this rule dramatically increases the likelihood that unconstitutionally excessive fines will be imposed. At the same time, moreover, the Government would prevent courts from evaluating the excessiveness of such forfeitures and reducing, as did the district court below, the amount of the forfeiture in order to avoid a constitutional violation. The real-world consequences

of adopting the Government's interpretation are illustrated by the following hypothetical.

Imagine a businessperson who collects rare coins. Suppose he decides to carry his coins, valued at $100,000, to an exhibition in Toronto. On the day of his trip he arrives at the airport 45 minutes late, and in his haste to avoid missing the plane, overlooks the "prominently posted signs informing passengers in several languages of the need to report sums over $10,000.00." *United States v. $94,000.00 in United States Currency*, 2 F3d 778, 784 (7th Cir. 1993). Before the plane departs, a Customs inspector discovers the coins in his luggage, and the man is arrested for failing to make the proper currency report.

At trial the prosecutor proves only that the coins were worth more than $10,000 and that the man was booked for a flight to Toronto. Because the trial occurs outside the Eleventh Circuit, his ignorance of the law is no defense, and the man is convicted of violating 31 U.S.C. § 5316(a)(1)(A). The court never inquires into the source of his money, the use to which it was to be put, or any other measure of personal culpability. The man thus loses his property to the Government solely because he failed to report how much money he was carrying.

The potential consequences of adopting the Government's interpretation of the forfeiture statute are plain. If read as the Government urges, Section 982(a)(1) will permit the Government to impose forfeiture of lawfully obtained funds from defendants, regardless of personal culpability, without any opportunity for the courts to reduce the amount of the forfeiture if it is found to be unconstitutionally excessive. This interpretation risks the Government's acting unlawfully by dramatically increasing the likelihood that unconstitutionally excessive fines will be imposed.

C. The Government's Interpretation of 18 U.S.C. § 982(a)(1) Invites the Imposition of Unconstitutionally Excessive Fines.

This Court has so far declined to establish a test for determining when a particular fine, subject to the limitations of the Excessive Fines Clause, is excessive. *See Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993). It has preferred instead to allow the issue to percolate among the lower courts. *See id.* (citing *Yee v. Escondido*, 503 U.S. 519, 539 (1992)).

Several circuit courts have already responded to this invitation by devising tests to determine when a fine is unconstitutionally excessive. *See, e.g., United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995); *United States v. Chandler*, 36 F.3d 358, 363 (4th Cir. 1994); *United States v. Real Property Located in El Dorado County*, 59 F.3d 974, 985-86 (9th Cir. 1995). *But see United States v. Certain Real Property Located at 11869 Westshore Drive*, 70 F.3d 923, 930 (6th Cir. 1995) (declining to adopt a single test for excessiveness).

While there has been extensive discussion among the courts regarding the appropriate factors to consider when determining whether the imposition of a particular fine would be unconstitutionally excessive, we are aware of no court that entirely omits the culpability of the owner from consideration. Despite this widespread understanding of the law, the Government would have federal judges shut their eyes to the presence or absence of personal culpability. Assuming that the Court accepts the relevance of personal culpability, in any form, as a criterion of validity under the Excessive Fines Clause,

the Government's interpretation of 18 U.S.C. § 982(a)(1) invites the imposition of unconstitutionally excessive fines. For that reason alone the Government's position should be rejected. However, its particular interpretation of the statute raises another constitutional objection as well.

II. THE GOVERNMENT'S POSITION WOULD REMOVE AN INDISPENSABLE CHECK ON THE GOVERNMENT'S ABUSE OF CRIMINAL FORFEITURE BY ALL BUT ELIMINATING JUDICIAL REVIEW.

The Government contends that courts have "a limited role in determining whether a punitive forfeiture is constitutionally excessive." Br. Pet. at 29.

> Under the statutory scheme, a district court does not have discretion to reduce the amount of a civil or criminal forfeiture. Congress entrusted to the Secretary of the Treasury and to the Attorney General the responsibility to decide the circumstances under which such a reduction would be warranted.

Id. at 5. The Government would limit courts faced with an allegedly excessive fine to ask only whether a challenged forfeiture is "'grossly disproportionate' to the seriousness of the offense." *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Because Section 982(a)(1) deems forfeited what the Government construes to be "the instrumentalities of crime," *id.* at 11, the forfeiture "will virtually always constitute a proportionate punishment." *Id.* at 28. This already restricted scope of judicial review is further strait jacketed, in the Government's opinion, by the "substantial deference [that] must be given to Congress' judgment concerning the seriousness of the offense." *Id.* (citing *Harmelin v.*

Michigan, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). "[A]s long as Congress has made a reasonable judgment that the punishment fits the crime, judicial inquiry is at an end." *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Solem v. Helm*, 463 U.S. 277, 303 (1983)).

This argument is objectionable because it undermines the authority of federal courts to vindicate claims under the Excessive Fines Clause. To see just how deeply the Government's argument cuts into the courts' authority of judicial review, consider why courts possess that authority in the first place.

When presented with a justiciable legal dispute over which it has jurisdiction, a court has the *duty* "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This duty occasionally requires courts to apply a constitutional provision in preference to an ordinary statute.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST No. 78, at 525 (Jacob E. Cooke ed., 1961) (Alexander Hamilton). In short, "It is a proposition too plain to be contested that the Constitution controls

any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act." *Marbury*, 5 U.S. (1 Cranch) at 177.

Here, however, the Government has suggested that the Court all but abandon its duty to give the Constitution controlling force over an ordinary statute when the statute is the forfeiture provision contained in 18 U.S.C. § 982(a)(1) and when the controlling constitutional provision is the Excessive Fines Clause. According to the Government, "a district court does not have discretion to reduce the amount of a civil or criminal forfeiture." Br. Pet. at 5. Nothing in that stark, dogmatic statement allows for the possibility that a particular forfeiture under 18 U.S.C. § 982(a)(1) might violate the Excessive Fines Clause. Unfortunately, this absence of qualification cannot be explained away merely as a poor choice of words.

The Government repeatedly urges this Court to find that all criminal forfeitures under Section 982(a)(1) are *inherently* constitutional under the Excessive Fines Clause. This is so, the Government says, because "the most relevant constitutional inquiry is whether the value of the fine is excessive when compared to the seriousness of the offense." Br. Pet. at 28 (citing *Austin v. United States*, 509 U.S. 602 (1993) (Scalia, J., concurring in part and concurring in the judgment). Since "[t]he government has an overriding sovereign interest in controlling what property leaves and enters this country," Br. Pet. at 20 (citing *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977)), the punishment always fits the crime. "[T]he defendant, through his own actions, has put his property in the service of crime, and thereby has set the size of his own financial penalty." Br. Pet. at 28.

This argument, while inventive, proves too much. If valid, it would mean that no forfeiture, under any statute,

could be challenged under the Excessive Fines Clause. The Government, in theory, could always assert "an overriding sovereign interest" in whatever legislative purpose gave rise to a forfeiture statute, and the amount of a forfeiture could always be defended with the argument that "the Defendant set the price of his own fine." The Government's argument thus devolves merely to a clever attempt to sidestep the constitutional requirement that fines imposed by the Government not be "excessive."

The constitutional demands of the Excessive Fines Clause cannot be so easily shrugged off, however. To accept the Government's argument would invite the very governmental abuse that the framers of the Eighth Amendment sought to prevent. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262-68 (1989) (reviewing the historical pedigree of the Excessive Fines Clause). Furthermore, it would run counter to this Court's admonitions regarding the tendency of Government to abuse its forfeiture authority and the indispensable role of judicial review in correcting such abuse.

"Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). Prevention of the unjust imposition of forfeiture is to be found, the Court has said, not in eliminating forfeiture as a law enforcement tool, but in judicial review. *See id.* at 635. Moreover, such review must be especially searching, given the Government's self-interest in imposing fines.

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of

> retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue . . . . It makes more sense to scrutinize governmental action more closely when the State stands to benefit."

Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion).

For these reasons, the Court should reject the Government's suggestion that 18 U.S.C. § 982(a)(1) permits courts to exercise only an eviscerated form of judicial review.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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